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Same-Sex Partnership, International Protection

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A. Introduction

1 Many people want to live their life in intimate partnership with another person. And many do. These two facts have been recognized and protected in law for many centuries. Hence the existence—in domestic law—of family law, and of numerous related provisions in other areas of public and private law. International law, too, and especially international law on the protection of → *human rights*, recognizes and protects the desire for, and existence of intimate partnership. It does so mainly through guaranteeing rights to marriage, to family, and to private life, and through prohibitions of discrimination (see also → *Equality of Individuals*; → *Family, Right to, International Protection*; → *Privacy, Right to, International Protection*).

2 Intimate partnership can mean different things to different people at different times. For many people it would (ideally) involve loving each other, caring for each other, living together in the same house, having sexual contact with each other, raising children together, staying together for life, and having some things in joint possession. However, none of these characteristics seems to be a universal *conditio sine qua non* for marriage or for other forms of intimate partnership. Therefore the notion of partnership is used here in the wide sense of a relationship between two people which is intimate in at least some of the ways mentioned.

3 For most women and for most men, their desire and practice to live in an intimate partnership is gendered: they prefer to do so with a woman or they prefer to do so with a man. Accordingly, existing intimate partnerships can be classified as being either between partners of different sexes or between partners of the same sex. Although international human rights instruments do not contain wordings that refer explicitly to heterosexual partnership, their provisions on the rights to marriage, to family, and to privacy have traditionally often been interpreted as only covering different-sex partners. Thus same-sex partnership has often been excluded from the protection of these rights.

B. State Practice

4 A similar strong tendency to contemplate and regulate only different-sex partnerships has long been characteristic of virtually all domestic legal systems. However, in recent decades, a growing number of national and sub-national jurisdictions have started to give (some) legal recognition to same-sex partnerships. In many jurisdictions this began with administrative practice, case law, and/or legislation recognizing the informal or *de facto* cohabitation of same-sex couples for some specific purposes; the earliest examples of these partnership rights for lesbian and gay couples go back to the 1970s. Since 1989 a slightly smaller number of jurisdictions have introduced some form of registered partnership—also called civil partnership, civil union, civil pact, etc. The structure, procedure, status, and legal consequences attached to these new legal forms tend to be more or less similar to those of marriage, although in some jurisdictions there is still a big difference between the legal content of marriage and the legal content of registered partnership. Finally, since 2001 the legislatures and/or courts of a growing number of jurisdictions have opted to open up the existing institution of civil marriage to same-sex couples.

5 As of June 2021 the situation in the countries of the world seems to be as follows (for more detailed overviews, see the annual report *State-Sponsored Homophobia* published by ILGA). Marriage has been opened up to same-sex couples in 16 European countries, in eight American countries, in parts of Mexico, and in South Africa, New Zealand, Australia, and → *Taiwan* (and also in all overseas territories of France and Denmark, in most overseas territories of the United Kingdom [‘UK’] and the United States [‘US’], and in some of the overseas territories of the Netherlands, but not in those of New Zealand). The opening up of

marriage is pending or being discussed in several countries (including Chile, Czechia, → *Nepal*, and Switzerland).

6 In most of the 29 countries where same-sex marriage is now possible, first a form of *registered partnership* for same-sex couples and sometimes also for different-sex couples had been introduced under various names in some regions (for example in parts of Australia, Canada, Mexico, Spain, and the US) or at the national level (exceptions include Colombia, Costa Rica, Portugal, and Taiwan). In some of these countries the option of partnership registration was abolished again when marriage was opened up to same-sex couples (including Denmark, Finland, Germany, Iceland, Ireland, Norway, and Sweden). In other countries couples now have a choice between partnership registration and marriage (including Argentina, Austria, Belgium, Brazil, Ecuador, France, Luxembourg, Malta, Netherlands, New Zealand, South Africa, Uruguay, and the UK). A form of registered partnership also exists in at least thirteen other countries (→ *Andorra*, Chile, → *Cyprus*, Czechia, Estonia, Greece, Hungary, Italy, → *Liechtenstein*, → *Montenegro*, → *San Marino*, → *Slovenia*, and Switzerland) and in parts of Japan. Partnership legislation is being discussed in a few other countries, including Thailand.

7 Recognition of *informal cohabitation* of same-sex partners—at least for some legal purposes—often preceded the introduction of a form of registered partnership or the opening up of marriage. Such recognition of *de facto* couples now exists in most of the more than 40 countries that allow same-sex marriage and/or same-sex partnership registration, and also in some other jurisdictions (for example → *Hong Kong*, Israel, Japan, → *Namibia*, and Poland).

8 So on the one hand large parts of the world now recognize same-sex partnership to some degree, and there is a clear trend towards further recognition. On the other hand, such recognition is as yet (very) limited in some jurisdictions, while remaining absent or (highly) controversial in many jurisdictions all over the world. This is illustrated by enactments specifically banning the recognition of same-sex marriages (such as the federal Defense of Marriage Act of 1996 in the US, later set aside by case law), and by the criminalization in Nigeria of (*inter alia*) same-sex marriage ceremonies (Same Sex Marriage (Prohibition) Act, 2013). Provisions entrenching the heterosexual character of marriage have even been introduced into some national constitutions, including those of Bolivia (Art. 63 of the new constitution of 2009), the Democratic Republic of Congo (Art. 40 of the new constitution of 2006; → *Congo, Democratic Republic of the*), Honduras (Art. 112 as amended in 2005, also prohibiting same-sex *de facto* unions), Hungary (Art. L of the new constitution that took effect in 2012), Latvia (Art. 110 as amended in 2006), and Uganda (Art. 31 (2) (a) as amended in 2005).

9 Against that two-sided background, the question arises: what protection does public international law offer to same-sex partnership in its three principal forms: civil marriage, informal cohabitation, and registered partnership? The question breaks down into a primary question on the implications of international human rights for national law (see paras 13–27 below), and a secondary question relating to the international recognition of nationally recognized forms of same-sex partnership (see paras 28–37 below).

C. Parenting Issues

10 A related, and often even more controversial, issue is that of parenting by lesbian or gay individuals or couples. On this issue, too, there has been a marked evolution. A growing number of jurisdictions now allow same-sex couples jointly to foster or adopt a child, allow women in lesbian relationships to have a child through medically assisted insemination, and/or provide for joint parental status and/or responsibilities if a child is born to a woman in a lesbian relationship. There is some international case law on parenting by same-sex

couples (see also Principle 24 Yogyakarta Principles). In an early case in 1992 the → *European Commission of Human Rights (ECommHR)* found that, as regards joint parental authority over a child born by means of artificial insemination, 'a homosexual couple cannot be equated to a man and a woman living together' (*Kerkhoven v the Netherlands* para. 2). However, since then there have been some notable developments regarding parenting. For example in 2018 the → *European Court of Human Rights (ECtHR)* seemed to imply that it should be possible for two same-sex partners to have joint parental authority over the child of one of them (*Bonnaud and Lecoq v France* App 6190/11 para. 43)

11 Already in 1999 the ECtHR found sexual orientation discrimination contrary to Art. 14 → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* ('ECHR') in conjunction with Art. 8 ECHR, in a case where a divorce court had awarded parental responsibility to the mother, on the grounds that the father 'was a homosexual and was living with another man' (*Mouta v Portugal* para. 34). In 2012 the → *Inter-American Court of Human Rights (IACtHR)* ruled in a very similar case, concerning a decision of the Supreme Court of Justice of Chile which on the basis of sexual orientation had denied custody to a mother who after her divorce had entered into a relationship with a person of the same sex. The IACtHR found this to be incompatible with several rights guaranteed in the → *American Convention on Human Rights (1969)* ('ACHR') (*Atala v Chile*).

12 In a 2008 case involving an application for individual adoption, the ECtHR found it unacceptable under Art. 14 ECHR to base the rejection of the applicant on considerations regarding her sexual orientation (*EB v France* paras 93–98). Also the Revised European Convention on the Adoption of Children of 2008 expressly contemplates the possibility of adoption by same-sex couples. According to Art. 7 (2) 'States are free to extend the scope of this Convention to same sex couples who are married … or who have entered into a registered partnership', or 'who are living together in a stable relationship'. In 2013 the ECtHR ruled that Austria had violated Art. 14 in conjunction with Art. 8 ECHR, because it excluded second-parent adoptions by same-sex partners while allowing such adoptions by different-sex unmarried partners (*X v Austria* para. 153). However, the ECtHR also ruled that with respect to second-parent adoption unmarried same-sex partners are not in a situation that is relevantly similar to that of a married different-sex couple, and that therefore in that respect there was no discrimination (ibid para. 109), a view which the Court repeated in another adoption case (*Gas and Dubois v France*), and also in a case about the refused registration (in a birth certificate) of the name of the female partner of a mother as the second parent of the latter's child (*Boeckel v Germany*).

D. International Standards for Domestic Law

1. Same-Sex Marriage

13 In contrast to the growing international protection for same-sex cohabitation outlined below, there is little explicit authority for the proposition that international law requires countries to open up the institution of civil marriage to same-sex couples. The strongest authority can be found in the provisions, contained in most international human rights instruments, that each fundamental right—including the right to marry—should be ensured to all individuals without distinction of any kind, such as sex or other status, eg Arts 2 (1) and 26 International Covenant on Civil and Political Rights ('ICCPR'; → *International Covenant on Civil and Political Rights [1966]*). This is important because neither the words nor the → *travaux préparatoires* of the main human rights instruments explicitly limit the right to marry to heterosexual couples. The words 'men and women' used in Art. 16 Universal Declaration of Human Rights (→ *Universal Declaration of Human Rights [1948]*) were inserted into that provision on the right to marry not with the intention to make the heterosexual character of marriage explicit, but with the explicit purpose of clarifying that women should have the 'same freedom' and 'equal rights' as men have regarding marriage.

This is abundantly clear in the *travaux préparatoires* of the Universal Declaration. The words ‘men and women’ are there to make the right to marry gender-neutral, not to make it orientation-specific. Also the *travaux préparatoires* of the ECHR, of the ICCPR, and of the ACHR do not seem to include any indication that the words ‘men and women’ or any other words were specifically intended to exclude same-sex couples from the right to marry. Although the human right to marry has traditionally been read as a right for heterosexual couples only, its articulation in the main human rights instruments is capable of being interpreted in a way that does not exclude homosexual couples. This has now been accepted by two regional human rights courts, albeit more tentatively by the ECtHR than by the IACtHR (see below).

14 The first case decided by an international human rights court or body on the question whether a same-sex couple can derive a right to marry from international human rights law is that of *Joslin v New Zealand*. Because of the words ‘men and women’ in the wording of the right to marry in Art. 23 (2) ICCPR, the → *Human Rights Committee* (‘HRC’) of the → *United Nations (UN)* rejected the claim that the exclusion of same-sex couples from marriage violated that article (ignoring the gender-neutral history of the insertion of the words ‘men and women’, see para. 13 above). Because of the existence of a specific provision on the right to marry, the HRC also found that there could not be a violation of other rights invoked by the claimants (Arts 16, 17, 23 (1) and 26 ICCPR). The HRC did not address the impact of the non-discrimination provision of Art. 2 (1), which had also been invoked by the claimants. It should be noted that the words ‘men and women’ do not appear in the right to marry as formulated in Art. 5 International Convention on the Elimination of All Forms of Racial Discrimination (1965), in Art. 16 Convention on the Elimination of Discrimination against Women (1979) (see also → *Women, Rights of, International Protection*; → *Racial and Religious Discrimination*), in Art. 9 → *Charter of Fundamental Rights of the European Union (2000)* (‘EU Charter’), or in Art. 23 Convention on the Rights of Persons with Disabilities (2006) (→ *Disabled People, Non-Discrimination of*). Therefore these provisions do not allow for the textual argument used by the HRC in its interpretation of Art. 23 ICCPR.

15 In several cases on transgender issues, the ECtHR had considered that Art. 12 ECHR, which also uses the words ‘men and women’ in its wording of the right to marry, enshrines the traditional concept of marriage as being between a man and a woman (see eg *Parry v United Kingdom*). However, in 2010 the ECtHR (having regard to Art. 9 EU Charter) discarded the textual argument that the use of the words ‘men and women’ in the wording of the right to marriage meant that this right ‘must in all circumstances be limited to marriage between two persons of the opposite sex’ (*Schalk v Austria* para. 61). Nevertheless, noting that ‘there is no European consensus regarding same-sex marriage’ (ibid para. 58) and that Art. 9 EU Charter like Art. 12 ECHR makes reference to ‘the national laws governing the exercise of these rights’, the Court concluded that ‘as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law’ (ibid para. 61), and that therefore Art. 12 ECHR on the right to marry had not been violated. The ECtHR also ruled that the Austrian ban on same-sex marriages did not violate Art. 14 ECHR on non-discrimination taken in conjunction with the right to respect for private and family life of Art. 8 ECHR, because the latter provision is of more general purpose and scope than Art. 12 ECHR (ibid para. 101). The Court did not address the possible impact of the right to non-discrimination of Art. 14 ECHR taken in conjunction with Art. 12 ECHR itself, but in several later cases the ECtHR stated, without giving any specific reasons, that the exclusion of same-sex couples from marriage did not amount to a

violation of Art. 14 in conjunction with Art. 12 (*X v Austria* para. 106; *Oliari v Italy* para. 193; *Chapin v France* paras 38–40).

16 In 2017 the IACtHR went much further. In its *Advisory Opinion OC-24/17 (on Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples)*, it concluded that the ACHR 'protects the family ties that may derive from a relationship between a same-sex couple', that rights derived from such family relationships must be recognized and protected, and that therefore 'States must ensure full access to all the mechanisms that exist in their domestic laws, including the right to marriage, to ensure the protection of the rights of families formed by same-sex couples, without discrimination in relation to those that are formed by heterosexual couples' (para. 229, points 6, 7, and 8) (→ *Advisory Opinion: Inter-American Court of Human Rights [IACtHR]*). Nevertheless the IACtHR showed itself aware of the 'possibility that some States must overcome institutional difficulties to adapt their domestic law and extend the right of access to the institution of marriage to same-sex couples … which may demand a process that is politically complex and requires time' (ibid para. 226). To this it added that 'States that do not yet ensure the right of access to marriage to same-sex couples … must … ensure them the same rights derived from marriage in the understanding that this is a transitional situation' (ibid para. 227).

17 International courts and human rights bodies are divided on the question whether or not it is permissible for countries to prevent marriages from becoming 'same-sex' in case one of the spouses has a change of sex/gender. In two cases the ECtHR has held that rules preventing a married person from remaining married while having a legal change of sex did not amount to a violation of human rights (*Parry v United Kingdom*; *Hämäläinen v Finland*). The HRC, however, has found that it is an arbitrary interference with privacy and family, and 'discrimination on the basis of marital and transgender status', to only allow *unmarried* persons to amend the sex on their birth certificate after undergoing a sex affirmation procedure, and that this cannot be justified by referring to the heterosexual definition of marriage (*G v Australia* paras 7.3–15). Similarly, but only for the specific context of access to a retirement pension, the Court of Justice of the European Union ('ECJ'; → *European Union, Court of Justice and General Court*) considers it unlawful sex discrimination to require a person who has changed gender 'to satisfy the condition of not being married to a person of the gender that he or she has acquired as a result of that change, in order to be able to claim a State retirement pension as from the statutory pensionable age applicable to persons of his or her acquired gender' (Case C–451/16 *MB v Secretary of State for Work and Pensions* para. 53). In light of its *Advisory Opinion OC-24/17* (see para. 16 above) it seems safe to assume that the approach of the IACtHR to such questions would be more like that of the HRC and the ECJ than like that of the ECtHR.

2. Informal Cohabitation of Same-Sex Partners

(a) Where Different-Sex Cohabitation Is Already Recognized

18 There is strong and growing authority for the proposition that international law prohibits sexual orientation discrimination and that discrimination between unmarried different-sex cohabitants and unmarried same-sex cohabitants is covered by that prohibition.

19 In 2003 the ECtHR came to that conclusion in the case of a surviving partner of a deceased tenant who wanted to succeed to the lease of the flat in which they had been living together (*Karner v Austria*). It ruled that the exclusion of same-sex partners from the category of unmarried life companions entitled to such a succession was a violation of Art. 14 ECHR in conjunction with Art. 8 ECHR. It found that it had not been shown that the exclusion of persons living in a homosexual relationship was 'necessary' for achieving the

aim—in itself legitimate—of protecting the family in the traditional sense (ibid para. 41). Thus the ECtHR has departed from its earlier admissibility decision in the case of *Estevez v Spain* (about a survivor's pension) and from a series of decisions of the former ECommHR. In 2010 in three similar cases (one on rent law in Poland, one on health insurance cover for partners of civil servants in Austria, and one on the calculation of child maintenance in the UK) the Court repeated and confirmed the approach it had taken in the case of Karner (*Kozak v Poland* para. 99; *PB v Austria* para. 42; *JM v United Kingdom* para. 56). Later the ECtHR applied the same reasoning in cases regarding access to second-parent adoption (*X v Austria*, see para. 12 above) and regarding immigration (*Pajić v Croatia*).

20 In two cases, *Young v Australia* and *X v Colombia*, the HRC came to the same conclusion as the ECtHR. Both cases involved the refusal of a survivor's pension to a same-sex partner, under domestic rules that did provide for such a pension to be paid out to a surviving unmarried different-sex cohabitant. The HRC concluded that there had been sexual orientation discrimination in violation of Art. 26 ICCPR. It considered in both cases that the State Party concerned had not put forward arguments justifying the distinction as reasonable and objective.

21 Recently also the IACtHR (in a case about a survivor's pension) and the → *Inter-American Commission on Human Rights (IACommHR)* (in a case about the right of prisoners to receive intimate visits from their life partners) have ruled that the exclusion of (unmarried) same-sex partners amounts to a violation of several articles of the ACHR (*Duque v Colombia*; *Álvarez Giraldo v Colombia*). This is in line with what the IACtHR wrote in its *Advisory Opinion OC-24/17*: there should be no discrimination between homosexual and heterosexual couples as regards patrimonial rights and as regards 'all the internationally recognized human rights, as well as the rights and obligations recognized under the domestic law of each State that arise from the family ties of heterosexual couples' (paras 197–99).

22 The ECJ has also found that discrimination between same-sex and different-sex cohabitants amounts to sexual orientation discrimination, first in Case C–249/96 *Grant v South-West Trains Ltd* (1998), and more explicitly in Case C–267/06 *Maruko v Versorgungsanstalt der deutschen Bühnen* ('*Maruko Case*'). And it has held that sexual orientation discrimination—in the implementation of EU law—runs counter to a general principle of community law (Case C–147/08 *Römer v Freie und Hansestadt Hamburg* paras 59–60 ['*Römer Case*']; see also → *European Union Law and Domestic [Municipal] Law*). The EU Charter explicitly stipulates that '[a]ny discrimination based on any ground such as … sexual orientation shall be prohibited' (Art. 21 EU Charter). In the EU, Member States must prohibit sexual orientation discrimination by public and private employers (Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation). This prohibition extends to discrimination between (unmarried) different-sex and same-sex partners. Also as employers themselves, the EU institutions provide their staff with certain employment benefits for their cohabiting partners including same-sex partners. Several other international organizations, including the → *World Bank Group* and the → *International Monetary Fund (IMF)*, have adopted a similar policy towards their own staff.

(b) Where Different-Sex Cohabitation Is Not Recognized

23 Almost all jurisprudence on same-sex cohabitation listed above only applies to situations where domestic law already extends certain benefits of marriage to informally cohabiting different-sex partners. In these situations there is *direct* discrimination on grounds of sexual orientation, and in situations covered by international human rights law such direct discrimination is forbidden. There is now also explicit authority for the proposition that international human rights law requires some recognition of same-sex

cohabitation in situations where domestic law has not yet extended a certain benefit of marriage to cohabiting different-sex partners. In its *Advisory Opinion OC-24/17* the IACtHR has concluded that under the ACHR there is an obligation of States to recognize and protect 'the family relationships that same-sex couples who seek to undertake a life project together may establish by means of permanent emotional ties, typically characterized by cooperation and mutual support' (para. 191). Obligations to recognize same-sex relationships have also been articulated in the Yogyakarta Principles (especially in Principles 9 (e), 13 (a), 17 (h), and 24, including their 2007 update).

24 More specifically, the argument can be made that excluding all unmarried partners from such a benefit amounts to *indirect* sexual orientation discrimination, because the discriminatory effect is clearly disproportionate as it affects only a small number of different-sex couples but all same-sex couples. With regard to the latter category, the exclusion cannot be justified along the lines adopted by the HRC in the case of *Danning v the Netherlands*, because in that case the different-sex cohabitants involved had chosen not to enter into marriage, a choice which in most countries of the world is not open to same-sex cohabitants (see the individual opinion of members Lallah and Scheinin appended to the views of the HRC in *Joslin v New Zealand*). It is generally accepted in international human rights law that indirect discrimination also amounts to a violation of the right to non-discrimination (see eg the opinion of the HRC in *Althammer v Austria*; and the judgment of the ECtHR in *DH v Czech Republic*).

25 The ECtHR has furthermore specified that the right to non-discrimination 'is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different' (*Thlimmenos v Greece* para. 44). Its judgment in the case of *Taddeucci and McCall v Italy* is the first time the ECtHR has applied this aspect of the right to non-discrimination to same-sex partners. The Court found 'the fact that they were not treated differently from unmarried heterosexual couples, who alone had access to a form of regularisation of their partnership, had no objective and reasonable justification' (ibid para. 96) and concluded that 'by deciding to treat homosexual couples—for the purposes of granting a residence permit for family reasons—in the same way as heterosexual couples who had not regularised their situation the State infringed the applicants' right not to be discriminated against on grounds of sexual orientation' (ibid para. 98). Accordingly there is scope for international human rights cases in which same-sex cohabitants claim that they should *not* be treated in the same way as different-sex cohabitants and that they should be awarded certain 'essential rights' (ibid paras 83 and 95) that so far are the exclusive privilege of married different-sex partners. The notion of 'essential rights' includes at the very least the right to live in the same country as your partner (the subject matter of *Taddeucci and McCall v Italy*) and corresponds to the notion of 'core rights relevant to a couple in a stable and committed relationship' introduced in the case of *Oliari v Italy* (para. 174).

3. Registered Partnership

26 Both the ECtHR (*Vallianatos v Greece*) and the IACtHR (*Advisory Opinion OC-24/17* para. 228) have taken the position that if different-sex couples have access to a form of registered partnership, then same-sex couples should also have access to it. This in itself does not yet imply that, in the absence of the opening up of marriage for same-sex couples, international law requires the introduction of a form of registered partnership. However, already in 2010 the ECtHR acknowledged the 'need' of same-sex couples 'for legal recognition and protection of their relationship' (*Schalk v Austria* para. 99). Five years later the ECtHR elaborated on this: 'same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their

relationship legally recognised and which would guarantee them the relevant protection—in the form of core rights relevant to a couple in a stable and committed relationship—without unnecessary hindrance' (*Oliari v Italy* para. 174). After referring to the positive attitudes of 'the general Italian population and the highest judicial authorities in Italy' (ibid para. 179) to some legal recognition for same-sex couples, the Court concluded that 'in the absence of a prevailing community interest being put forward by the Italian Government, against which to balance the applicants' momentous interests as identified above … the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions' (ibid para. 185), a conclusion that was repeated in the case of *Orlandi v Italy* (para. 210). Also the IACtHR appears to require such a legal framework in all 'States that do not yet ensure the right of access to marriage to same-sex couples', but it does not speak specifically about the introduction of a form of registered partnership, but more generally about the obligation to 'ensure them the same rights derived from marriage' (*Advisory Opinion OC-24/17* para. 227).

27 In the already mentioned *Maruko Case* the ECJ had to consider the question whether it is sexual orientation discrimination when a survivor's pension is only available for married different-sex partners and not for registered same-sex partners. The ECJ found that this does indeed amount to *direct* sexual orientation discrimination—contrary to Directive 2000/78/EC on Equal Treatment in Employment—if, under national law, registered partnership places persons of the same sex in a situation comparable to that of spouses. In the *Römer Case* and in Case C–267/12 *Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* ('*Hay Case*'), the ECJ came to the same conclusion. In none of these three very similar cases did the ECJ address the question whether there would be *indirect* sexual orientation discrimination (see paras 24–25 above) if the legal situations of married and registered partners were less comparable. In 2010 the ECtHR declared an application inadmissible in a somewhat similar case concerning France, where a survivor's pension was only available for a surviving spouse, not for a surviving partner in a *pacte civil de solidarité* ('PACS'). The ECtHR found, *inter alia*, that the situations of spouses in marriage and partners in PACS were not analogous, because of the many legal differences between the two institutions, and that therefore there was no discrimination (*Manenc v France*). The ECtHR did not indicate why there was no *indirect* discrimination in this case.

E. International Recognition of Domestic Status

28 To a large degree questions relating to the recognition of existing same-sex partnerships from other jurisdictions—and of their consequences—are left to national rules on conflicts of law. However, the application of these national rules must be in accordance with international human rights law. In this complicated field there is already some international law emerging, both in case law and in the form of written rules.

1. Recognition of Existing Same-Sex Marriages

29 There are many international treaties on → *private international law*, eg the Hague Convention on Celebration and Recognition of the Validity of Marriages, that make reference to marriage. Most of them do not explicitly restrict the notion of marriage to different-sex marriages, so they can and possibly should be interpreted as being also applicable to same-sex marriages. Also the *travaux préparatoires* of such treaties typically do not indicate that same-sex marriages should be excluded from their application. Meanwhile the number of countries that—although not allowing same-sex couples to marry

—do recognize existing foreign marriages for at least some purposes is growing (eg Israel and Peru, see the annual report *State-Sponsored Homophobia* published by ILGA).

30 Since 2017 there is international case law requiring *some* legal recognition of foreign same-sex marriages. In the case of *C v Australia*, concerning the non-availability of access to divorce in Australia for a woman who had married another woman abroad, the UN HRC concluded that this 'differentiation of treatment based on her sexual orientation… constitutes discrimination' under Art. 26 ICCPR, because (*inter alia*) 'the State party has failed to provide any explanation of why its stated reason for providing divorce proceedings for unrecognized foreign polygamous marriages does not apply equally to unrecognized foreign same-sex marriages' (para. 8.6). This means that already before the opening up of marriage in Australia, this country had to recognize existing foreign same-sex marriages for the purpose of divorce. A more wide-ranging ruling has been delivered by the ECtHR, in a case where same-sex couples who had married abroad complained about Italy 'refusing to register their marriage under any form'; the Court found that Italy thereby left 'the applicants in a legal vacuum' and 'failed to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their same-sex unions' (*Orlandi v Italy* paras 209–10). The implication of this ECtHR ruling seems to be that foreign same-sex marriages must be recognized, but not necessarily *as marriages*. Recognition of such foreign marriages as forms of registered partnership may be sufficient. The principle that foreign same-sex marriages must be recognized at least in some form can also be derived from *Advisory Opinion OC-24/17* of the IACtHR (see para. 16 above).

31 In the specific context of free movement the ECJ has recently ruled that same-sex spouses are covered by the term 'spouse' in Art. 2 Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the Right of Citizens of the Unions and their Family Members to Move and Reside Freely within the Territory of the Member States (Case C–673/16 *Coman and Others* para. 35). The case concerned two men, one an EU citizen and the other a third country national, who had married in Belgium and now wanted to move to Romania. The ECJ held that EU law does not allow Romania to refuse this third country national a right of residence, as the fact that Romania itself does not allow same-sex marriages does not justify such a refusal (ibid para. 51). It now remains to be seen whether EU law will be interpreted as also requiring the recognition of foreign same-sex marriages for purposes other than the granting of residence rights.

32 Similar issues arise in the staff law of international organizations (→ *International Organizations or Institutions, Internal Law and Rules*). Already in a letter of 15 May 2001, the Director-General for Personnel and Administration of the European Commission has indicated that the EU Staff Regulations should be applied equally to same-sex and different-sex marriages. Since 2004 the UN also has been recognizing (most) same-sex marriages of its own staff. To that effect a UN Secretary-General's Bulletin of 24 September 2004 on Personal Status for Purposes of United Nations Entitlements specified that 'determining the personal status of staff members for the purpose of entitlements under the Staff Regulations and Rules has been done, and will continue to be done, by reference to the law of nationality of the staff member concerned' (UN Doc ST/SGB/2004/13). This was not yet helpful to staff members from countries that did not allow same-sex marriages. Therefore the text was amended ten years later, and now states that such personal status 'will be determined by reference to the law of the competent authority under which the personal status has been established' (UN Secretary-General's Bulletin of 26 June 2014 on Personal Status for Purposes of United Nations Entitlements UN Doc ST/SGB/2004/13/Rev.1).

33 Other international organizations which recognize the same-sex spouses of their own staff include the European Patent Office (see also → *European Patent System*), which has been recognizing same-sex marriages since 2004 (see *TK v European Patent Office* and *MES v European Patent Office*, judgments of the Administrative Tribunal of the → *International Labour Organization [ILO]*). Similarly, a Dutch citizen working for the → *Food and Agriculture Organization of the United Nations (FAO)*, who wanted to have his same-sex marriage recognized by his employer for the purposes of dependency benefits, won his case at the ILO Administrative Tribunal in 2007 (*EJP v Food and Agriculture Organization*). The tribunal reached its decision recalling its case law that as 'a general rule, and in the absence of a definition of the term, the status of spouse will flow from a marriage publicly performed and certified by an official of the State where the ceremony has taken place' (ibid para. 6). In a similar case of a married Canadian employee of the → *International Atomic Energy Agency (IAEA)* the tribunal in 2008 took the same approach, stressing that any restrictive definition should be contained in the Staff Regulations and Rules themselves, not in a mere information document (*JLH v International Atomic Energy Agency* paras 4–6).

2. Recognition of Existing Registered Partnerships

34 In 2004 the United Nations Administrative Tribunal (see also → *Administrative Boards, Commissions, and Tribunals in International Organizations*) found that a French employee of the UN who had entered into a *pacte civil de solidarité* ('PACS') should be considered as 'married' (*Adrian v Secretary-General of the United Nations*). Similarly, the ILO Administrative Tribunal ruled that for the purposes of the ILO Staff Regulations a Danish or German registered partnership was equivalent to marriage (*AHRC-J v International Labour Organization* and *DB v International Labour Organization*), and that the same is true for a French PACS, because 'in the absence of a contrary provision in the Staff Regulations and Rules, the principle of non-discrimination requires that for the purposes of dependency benefits the term "spouse" be interpretated as applicable to a relationship of mutual dependence under the relevant national law' (*EH v Food and Agriculture Organization* para. 19). In earlier cases both tribunals had still rejected similar claims, as had the ECJ, when in 2001 it considered that it could not interpret the EU Staff Regulations in such a way that 'legal situations distinct from marriage' (ie registered partnerships) are treated in the same way as marriage (*D and Sweden v Council of the European Union* para. 37). That judgment of the ECJ was largely overruled in the *Maruko Case*, the *Römer Case*, and the *Hay Case*, and was largely set aside when in 2004 the EU Staff Regulations were changed, so as to equate with marriage any 'non-marital partnerships' provided that certain conditions regarding stability are fulfilled (Art. 1d Staff Regulations of Officials and Conditions of Employment of Other Servants of the European Communities as amended by Council Regulation 723/2004).

35 A more limited recognition of registered partners found its way into Directive 2004/38/EC on the Right to Move. Here a registered partner is only considered to be a family member 'if the legislation of the host Member State treats registered partnerships as equivalent to marriage' (Art. 2 (2) (b) Directive 2004/38/EC on the Right to Move). If that is not the case, the country shall nevertheless at least have a duty to 'facilitate' entry and residence for the 'partner with whom the Union citizen has a durable relationship, duly attested' and for 'any other family members … who … are dependants or members of the household of the Union citizen' (Art. 3 (2) Directive 2004/38/EC on the Right to Move).

36 In 2007 the → *International Commission on Civil Status (ICCS)* adopted Convention No 32 on the Recognition of Registered Partnerships ('ICCS Convention No 32'). It was the first treaty in which registered partnership—or indeed same-sex partnership—was explicitly mentioned. The second treaty to do so was the Revised European Convention on the Adoption of Children of 2008 (see para. 12 above). The ICCS Convention (if and when it enters into force) will require the Contracting States to recognize the validity of partnerships registered in any other State—subject to several exceptions, such as manifest incompatibility with the → *ordre public (public policy)*. The convention will not require the recognition of all the legal effects of a registered partnership, but only the recognition of the surname of the partners, and the recognition of a previous registered partnership as an impediment for contracting a marriage with a third person. The possible recognition of other legal consequences is left to the operation of (national) rules of private international law. For the EU, see also Council Regulation (EU) 2016/1104 of 24 June 2016 implementing Enhanced Cooperation in the Area of Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of the Property Consequences of Registered Partnerships.

37 Irrespective of this ICCS Convention and EU Regulation, national rules of private international law need to be applied in accordance with international human rights law. The argument can be made that the denial of recognition for certain legal consequences of a foreign registered partnership will quite easily result in a violation of the right to non-discriminatory respect for the family life of the persons involved (and for their property). In this context it is important that the ECtHR now considers that 'a cohabiting same-sex couple living in a stable de facto partnership' falls within the notion of 'family life' (*Schalk v Austria* para. 94, overturning *Estevez v Spain*). This implies *a fortiori* that same-sex partners who registered or married abroad can rely on the right to respect for family life of Art. 8 ECHR. Also according to the IACtHR same-sex partners are covered by the term 'family' in Arts 11 and 17 ACHR (*Atala v Chile* paras 174–77).

F. Assessment

38 International protection for same-sex partnership is a topic that has seen important developments recently, reflecting more extensive national developments in a growing number of countries. These national and international developments are likely to continue to reinforce each other. The above analysis of the current state of international law (see paras 18–22 and 29–33 above) suggests that at least two 'global' norms have emerged: (1) a prohibition of discrimination between unmarried different-sex cohabitants and unmarried same-sex cohabitants; and (2) an obligation to recognize existing same-sex marriages from other jurisdictions (at least for some purposes). Two related 'global' norms seem to be emerging (see paras 17 and 34–37 above): (3) an obligation to respect existing marriages that are becoming 'same-sex' because one of the spouses is having a change of sex/gender; and (4) an obligation to recognize existing registered partnerships from other jurisdictions (at least for some purposes). As indicated above, authority for these four 'global' norms can be found in decisions of bodies of the UN, in decisions of European and Inter-American bodies, and also in the domestic law of countries in different parts of the world.

39 In two regions of the world (Europe and the Americas) two further norms are emerging. One of these regionally emerging norms is (5) an obligation to give same-sex couples access to a legal framework for their relationship. In the Americas this emerging obligation ultimately requires the opening up of marriage, while in Europe it still leaves it to the countries themselves to decide whether this legal framework will be marriage or only a form of registered partnership (see paras 13–16 and 26 above). The other regionally emerging norm is (6) an obligation to give same-sex couples access to rights and benefits derived from marriage. In the Americas this obligation seems to concern all rights that flow

from marriage, while in Europe it so far seems limited to core or essential rights, such as the right to live in the same country as your partner (see paras 16 and 25 above). For these emerging regional norms there is not yet much authority in decisions of bodies of the UN, and even less from regional bodies outside Europe and the Americas. However, these norms do reflect developments in domestic law that have at least started on all continents. It seems likely that in both regions the international case law will crystallize further, and there seems scope for some convergence between the approaches of the ECtHR and the IACtHR.

40 As the ECtHR has acknowledged, same-sex couples are 'in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship' (*Schalk v Austria* para. 99). And according to the IACtHR, the American Convention 'protects the family ties that may derive from a relationship between persons of the same sex' (*Advisory Opinion OC-24/17* para. 199). Any claims in this field deserve serious attention, because, as the ECtHR and the IACtHR consistently put it, the right to respect for private life encompasses 'the right to establish and develop relationships with other human beings' (see eg *EB v France* para. 43, and *Atala v Chile* para. 162). And, as regards the prohibition of discrimination based on sexual orientation, 'any restriction of a right would need to be based on rigorous and weighty reasons' (*Atala v Chile* para. 124; see also *EB v France* para. 91). Therefore it is not surprising that the IACtHR has started to articulate the principle that marriage should be made available to same-sex couples, while acknowledging that for several countries this is a process that will take time (*Advisory Opinion OC-24/17* paras 226–29). It is also no surprise that the ECtHR is leaving the question of allowing same-sex marriage to regulation by national law, while qualifying this with the words 'as matters stand' (*Schalk v Austria* para. 61), or that it has articulated the right for same-sex couples to have at least access to some legal framework and to certain core or essential rights (see paras 25–26 above). Thereby both courts have acknowledged both the controversial character and the dynamic nature of developments in the national and international protection of same-sex partnership. More developments can be expected in the decisions of international organizations and also in many countries (although not soon in all).

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